DOCUMENT RESUME

ED 349 597 CS 507 924

AUTHOR Trager, Robert; Russomanno, Joseph A.
TITLE "The Whole Truth": The First Amendment, Cultural Studies, and Comparative Law.
PUB DATE Aug 92
NOTE 42p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (75th, Montreal, Quebec, Canada, August 5-8, 1992).
PUB TYPE Speeches/Conference Papers (150) -- Reports - Research/Technical (143) -- Information Analyses (070)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS *Communication Research; Cultural Context; *Freedom of Speech; Higher Education
IDENTIFIERS *Cultural Studies; *Legal Research; Media Law

ABSTRACT

This paper argues that legal research, particularly in the areas of freedom of expression and comparative law, would benefit from utilizing the broader perspectives associated with the cultural studies approach used in communication research. The paper begins with an overview of traditional media law scholarship, maintaining that legal research, particularly in the areas of freedom of expression and comparative law, suffers from a narrow view, being confined by restrictive historical and precedent-based approaches. The paper then discusses the cultural studies approach to communication research, an approach concerned with the construction of meaning, and posits that studying isolated phenomena removes them from the nexus of factors which both influences and is influenced by them. As an example of a broader view, the paper focuses on a recent Canadian pornography case, an analysis of which shows the value of applying a cultural studies approach to the fields of First Amendment and comparative law. The paper does not advocate discarding traditional approaches in communication or legal scholarship, merely maintaining that complementing them with a cultural approach creates a reality that often more closely approximates "the whole truth." One hundred thirty-five notes are included. (SR)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED349597

"...The Whole Truth..."
The First Amendment, Cultural Studies, and Comparative Law

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN **OTHER THAN PAPER COPY** HAS BEEN GRANTED BY

Robert Trager

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

by
Robert Trager
and
Joseph A. Russomanno (student)

Submitted for presentation at the annual convention of the
Association for Education in Journalism and Mass Communication
Montreal, Canada
August 5-8, 1992

CS507924

BEST COPY AVAILABLE

ABSTRACT

" . . . The Whole Truth . . .":
The First Amendment, Cultural Studies and Comparative Law

Legal research, particularly in the areas of freedom of expression and comparative law, would benefit from utilizing the broader perspectives associated with the cultural studies approach used in communication research. Cultural studies is concerned with the construction of meaning, and posits that studying isolated phenomena removes them from the nexus of factors which both influences and is influenced by them. As an example, the paper notes how cultural studies would be useful in comparing the new Canadian approach to obscenity with United States obscenity law.

ABSTRACT

" . . . The Whole Truth . . .":
The First Amendment, Cultural Studies and Comparative Law

Cultural studies is a perspective that has gained popularity within communication research. It is primarily concerned with the construction of meaning, and has as its underlying principles that nothing occurs in a vacuum and that attempts to isolate given phenomena for the purpose of study removes them from the nexus of factors which both influences and is influenced by them. Just as more traditional communication research suffers from a narrow perspective, so does legal research, particularly in two areas -- freedom of expression scholarship and comparative law. Both often are confined by restrictive historical and precedent-based approaches. This paper suggests there is a parallel between typically accepted research methods in communication and in law, and, moreover, that legal research can benefit from utilizing the broader perspectives associated with cultural studies in communication. As an example, the paper notes how cultural studies would be useful in comparing the new Canadian approach to obscenity with United States obscenity law. The paper does not advocate discarding the traditional approaches in communication or legal scholarship, merely that complementing them with a cultural approach creates a reality that often more closely approximates "the whole truth."

" . . . The Whole Truth . . .":
The First Amendment, Cultural Studies and Comparative Law

I. Introduction

For nearly a century, legal research concerning freedom of expression and mass media law has been constrained by libertarian political views and case-oriented legal scholarship. Debates about First Amendment questions or media regulatory issues frequently occur within the narrow confines of such rubrics as "marketplace of ideas," "clear and present danger," "speech/action" and "public interest." Often, the support mustered for a position on any side of a First Amendment argument is a particular interpretation of Mill or Holmes[1] and purposefully selected Supreme Court decisions. Even studies of comparative free expression law may involve only the black-letter contrasting of United States' statutes and cases with those of another country.[2] Too often in legal research, there is little discussion and analysis of the causes for legislative, agency or court decisions -- aside from references to precedent -- and seemingly scant awareness of the maelstrom of events in the political, economic, religious, educational and other arenas which to one degree or another influence those decisions.[3] In part, this is due to First Amendment scholars' obsession with normative analysis, with moving our understanding of freedom of expression in the "right" direction, and in part it is due to judges' convictions that precedent is to be obeyed slavishly, without consideration of context and purpose.

As constricting as this narrow focus is for First Amendment research, it creates particular problems when undertaking comparative legal research, such as contrasting the status of freedom of expression in the United States with that in one or more other countries. Legal decision-makers are bound by the cultures in which they function, making an understanding of those cultures a necessary, though not sufficient, antecedent to a critical explication of the law.

Some legal scholars acknowledge that influences from outside courtrooms, legislative chambers and agency offices must be considered in assessing the past and prospective actions of law makers and courts. From one political perspective, proponents of the law and economics approach have tried to reach beyond traditional legal analysis.[4] From the other end of the political continuum, critical legal theorists,[5] critical race theorists[6] and feminist theorists,[7] have urged that legal analysis move toward a broader understanding of the place of laws in society. Those with a more centrist perspective have said that, at minimum, legal research should be cognizant of certain social science research tools which attempt to assess pertinent variables in the decisional process through means not common in legal scholarship.[8] For example, taken as a whole the field of sociology of law exhibits an understanding of the need to go beyond case law and the historical views that bind it.[9]

Much First Amendment research fails to do that. It does not take into account the broader perspectives suggested here, nor

acknowledge the symbolic properties of the legal structure. This paper suggests that cultural studies, an analytical framework gaining credence in communication research, offers an approach that First Amendment, media law and comparative law scholars may utilize to broaden the perspectives within which they normally work. For example, the cultural studies approach would suggest that statutes and court decisions in democratic countries not be seen only as laws imposed by authorities, but instead understood as responses to undercurrents in society, as governmental agencies reacting to societal pressures. These undercurrents and pressures themselves can be studied through social science methods. This is not to say that an understanding of judicial precedents, administrative decisions and the requirements of pertinent statutes is not an important component of legal research. Rather, it is to posit that one undertaking research in freedom of expression or mass media law can enhance his or her understanding of these areas by bringing to bear a broader perspective.

This paper begins with an overview of traditional media law scholarship, then discusses the cultural studies approach to communication research. It then shows how cultural studies may be applied to the law, and culminates with a discussion of a recent Canadian pornography case, an analysis of which shows the value of applying a cultural studies approach to the fields of First Amendment and comparative law.

II. Research Perspectives in First Amendment Scholarship

A. Traditional Analysis

Much legal scholarship takes as its text the discussion of the judiciary's "role within a liberal democracy."[10] While this implicates a variety of different topics, the discussions related to any one of them frequently take an historical perspective -- and often only an historical perspective. This tends to channel the scholarly piece or judicial opinion in a particular direction, since our view of history shifts only within narrow boundaries. For example, historicism generally does not recognize the way in which historical periods and events lead to social structures which create meaning in society. As Robert Gordon has written, "Over the last 150 years or so, enlightened American opinion has adhered with remarkable fidelity to what looks like a single set of notions about historical change and the relation of law to such change."[11] In part, many judges and legal scholars look no further than case precedent or confined historical analysis because they accept the "notions" to which Gordon refers.[12] These unspoken premises are not examined to determine their viability. The first principles on which the legal system is based are accepted in whole; it is only on the margins that the system might be honed.[13]

Freedom of expression and media law scholars also generally work within -- or argue against[14] -- "a single set of notions," i.e., the "libertarian,"[15] sometimes referred to as the "liberal,"[16] tradition in

American jurisprudence. Founded on the natural rights theories of John Locke,[17] and informed by Thomas Hobbes' views on individualism,[18] the libertarian tradition emphasizes the rights of the individual, juxtaposing them against the powers of collective government. According to this view, moral rectitude resides in the individual, and the purpose of government is to prevent other persons, and the government itself, from restricting the exercise of individual freedoms. Any governmental limitation on freedom may be only that required to guarantee individual rights, and must be imposed in a nondiscriminatory, evenhanded way.[19] The concept of justice, then, whether moral or political in nature, should be centered on the individual, not on a collective whole. Further, since individual rights are seen as predating political activity, they cannot be changed or usurped by group action.[20] These concepts comport with the argument that the Bill of Rights is intended to be a counter-majoritarian balance to the Constitution, specifically designed to protect the individual from the tyranny of the majority.[21]

Thus, the focus of the libertarian tradition is to protect individual rights. Much First Amendment scholarship focuses on how to define these rights with regard to freedom of expression, what to include within the Amendment's protection and how to guarantee that protected rights are not infringed, particularly by the government.

Despite its focus on individuals, the libertarian tradition acknowledges a place for government, i.e., to protect the rights of

each person. Instead of the government controlling the people, it is rather to be controlled by the populace. To do so, people must have information about the government and political processes. This leads some libertarians to believe that political speech is the central focus of the First Amendment.[22] According to this contention, people must be exposed to a wide variety of information and opinions, so that they may decide for themselves what is true and what is false. This "marketplace of ideas" concept, stemming from Milton[23] and championed by Holmes,[24] depends for its efficacy on the ability of individuals to have access to information, and to be rational in assessing the information they receive. Despite doubts cast on whether people think and act rationally[25] and on whether "truth" in fact may be determined,[26] the marketplace theory largely continues to be relied upon by courts[27] and supported by scholars.[28]

In addition to the principle of self-government, the libertarian approach to freedom of expression includes protection of individual self-fulfillment.[29] Sometimes joined with the value of "autonomy" and labeled "self-realization,"[30] self-fulfillment describes the contribution of speech to personal understanding and growth.[31] Thomas Emerson presented an early explication of the role of self-fulfillment in First Amendment analysis,[32] and C. Edwin Baker is its most prominent current exponent.[33] Baker argues that individuals must have the opportunity to create their own ways of life free from excessive government control, but that government does play a role in protecting individual liberties so that people may achieve self-fulfillment.[34]

This focus on the individual pervades traditional First Amendment analysis. It therefore is surprising that scholars generally ignore the individual as a factor in formulating First Amendment law, instead assuming that people only are affected by and react to legal decisions. Similarly, it is strange that freedom of expression scholarship concentrates on a narrow slice of society -- the political sphere -- and frequently ignores other influences on the law. As one observer has stated,

> Although the patterns of thought and action that make up our legal and political systems are diverse and have gone through numerous permutations, most of them stem from a relatively limited set of assumptions that reflect the Western heritage of Enlightenment thought -- beliefs, for example, in the fundamental autonomy of the individual from society, in universal, natural rights, and in the existence and values of neutral, objective forms of language and procedure.[35]

It is within these narrow boundaries -- libertarianism and its progeny -- that freedom of expression and media law scholars tend to function, limiting the breadth of understanding which a different approach to the field might permit. It is not argued here that the libertarian view of First Amendment law necessarily is unsupportable, although a Critical Legal Studies proponent likely would so argue.[36] Rather, the contention is that a thorough understanding of the rationales for freedom of expression, and the arguments for and against limits on protection for speech and press, can be achieved best through a method of legal scholarship that is

not limited to "an analysis of procedure, precedent, and doctrine,"[37] or to an explication of decisions made by "expert" agencies.

B. Application of Social and Behavioral Sciences Methods

It has been said that "[l]aw professors are not trained to do social scientific research. . . . They are trained to do doctrinal analysis."[38] Despite this, some law professors and other researchers have attempted to broaden First Amendment scholarship by applying to it research techniques first used in the social and behavioral sciences. In a rudimentary form, these techniques have been applied to the law for a century,[39] and scholars such as Max Weber[40] have encouraged applying sociological principles to studying the place of law in society. However, such approaches remain an object of derision among some scholars. For example, Geoffrey Hazzard has written, "In the end, as against the exigencies of the law's processes, the uses of behavioral science are relatively remote, its methods relatively expensive, and its results relatively inconsequential."[41] On the other hand, David Faigman has urged legal scholars to utilize the humanities and social sciences.[42] The social sciences "potentially offer insights into factual questions of legal concern and, moreover, may contain value judgments relevant to legal policy formation," according to Faigman.[43] The usefulness of social science methods in judicial decision-making, however, depends in part on the willingness of decision-makers to accept their validity, which they generally have not.

Despite criticism of using social and behavioral science approaches in legal studies, some scholars are applying interdisciplinary methods to freedom of expression and media law research by using, for example, historiographic techniques,[44] empirical methods,[45] basic statistical tests[46] and survey and experimental methods.[47] Such methods also occasionally are used by attorneys in court.[48]

Social and behavioral science methodologies add a perspective to First Amendment analysis that cannot be obtained solely by examination of precedent. This is true particularly if a sufficiently expansive view of the social and behavioral sciences is taken. As discussed further below, a number of social science, behavioral science and humanities disciplines should be considered essential components of legal scholarship, including First Amendment research, if it is to break out of the narrow confines within which it frequently operates.

III. A Cultural Studies Approach to First Amendment Research

A. Cultural Studies and Communication

The cultural studies approach has become an important component of communication and media research. Communication scholarship began in the first quarter of the twentieth century, amid both a realization that mediated messages had some degree of influence over their recipients, and an emerging scientific tradition.

The perception that communicated messages were having a growing impact on phenomena on a global scale grew particularly during the period between the World Wars. Despotic powers rose in Europe, it was thought, largely via their ability to sway potential followers with propaganda. At the same time, social science and its concomitant methods of investigative research grew in stature, particularly as their proven ability to solve many of nature's dilemmas became widely known. The study of communication and social scientific methods, then, grew concurrently. Thus, it was no accident that these methods were used in the initial studies of mediated messages.

By its very nature, scientific method strives to isolate particular phenomena to better study them. In this way, the given element being examined can be targeted as precisely as possible, arguably bringing into clear focus the factor's specific properties. This allows a cause-and-effect analysis, attempting to predict whether a particular set of conditions might produce a given result. Communication studies using this method, particularly as applied to the mass media, helped to establish communication research as a legitimate scholarly field.[49]

As communication research progressed into the mid- and late-twentieth century, questions were raised as to whether social and behavioral scientific methods were adequate to analyze the media effects, and whether the results of such studies could be supported. According to one critic,

> [Today], much doubt exists about the degree, incidence and kind of effects [of media messages on audiences,] and our knowledge is insufficient to make any but the most simple prediction about the occurrence of an effect in a given case. Even where we can make a prediction, it is usually based on experience and rule of thumb rather than on a precise knowledge of how a given effect has occurred or might occur.[50]

One of the perceived deficiencies of the phase of communication research when media were considered "all-powerful"[51] was the difficulty in isolating particular communication phenomena. The reason, a cultural studies proponent would suggest, is that mediated messages are but one element in a complex network of societal influences. American communication studies typically were "aimed at stating the precise psychological and sociological conditions under which attitudes are changed, formed, or reinforced and behavior stabilized or redirected."[52] While such an approach may be viable in studies of phenomena in the natural sciences, it becomes problematic when studying human beings, whose behavior rarely is predictable or easily explained.

The cultural studies approach to communication research in part arose in response to this scientific method. Rather than trying to isolate any particular phenomenon, it recognized the symbiotic relationships among various social institutions, including economics, politics, religion and the media, and the differing but interrelated influences these institutions have on individuals. At base level, then, cultural studies "entails recentering and thinking through the concept of culture relative to the mass media and disposing of the concepts of

effect and function."[53] Put differently, the "cultural studies tradition is centrally concerned with the construction of meaning -- how it is produced in and through particular expressive forms and how it is continually negotiated and deconstructed through the practices of everyday life."[54]

Historically, cultural studies evolved simultaneously, but largely separately, on each side of the Atlantic. These evolutionary processes found many of their roots in several of the major Schools of thought. In Europe, for example, the work of the Frankfurt School spawned a culturalist approach whose adherents "owe a great deal to the work of the members of the school,"[55] although they did not necessarily draw heavily on Frankfurt's critical theory.[56] This culturalist or socio-culturalist doctrine was marked by a positive approach to the products of mass culture and by the desire to understand the meaning and place assigned to particular groups in society. . It represents a confluence of many different yet compatible doctrines. Beginning in the 1950s, the cultural criticism of Raymond Williams,[57] E. P. Thompson[58] and Richard Hoggart[59] focused on the way dominant ideology and class consciousness are learned and enacted in everyday life. Both the British and American cultural studies traditions were influenced by their work, as well as that of Max Weber.[60] The work of semiologists -- Roland Barthes perhaps foremost among them[61] -- was crucial in positing the language-like codes underlying the production of popular culture.[62]

Empirical work by cultural studies researchers began in an organized manner with the establishment of the Centre for Contemporary Cultural Studies in Birmingham, England. The Centre investigated British social life, especially among youth subcultures and the working class. The study of mass communication audiences was prominent on the Centre's agenda, and gained its widest recognition with the work of David Morley.[63] However, the Centre's self-selected name -- conspicuously absent the words "communication" and "media" -- is symbolic of the perceived nature of its challenge: The study of communication and media goes deeper than either of those fields alone; it must embrace the totality of human experience, i.e., culture. Stuart Hall, the individual most closely associated with the Centre, has said about the cultural studies approach: "It defines 'culture' as both the means and values which arise amongst distinctive social groups and classes, on the basis of their given historical conditions and relationship, through which they 'handle' and respond to the conditions of existence . . . ."[64] Williams' work was the precursor of this belief, urging the burial of "mass communications" as a label, feeling that it limits study to the few areas that the term connotes.[65]

In its American form, cultural studies is an attempt to "reclaim and reconstruct" the tradition that is both historic and interpretive, embodied by the works of C. Wright Mills and Kenneth Burke.[66] The Chicago School pioneered a cultural approach to the study of society and, ultimately, to mass communication. At the University of Chicago, the "descendants" of John Dewey, Robert Park foremost

among them, stressed direct participation in cultures as a means of understanding them,[67] and developed the field of cultural anthropology.

The cultural approach seeks to understand the totality of an individual's environment with a careful and critically-directed analysis of the actual social experience of subgroups within a given society. To understand culture is to understand the relationships among and between groups and subgroups that contribute to a society's development. As Williams has stated, "[W]e cannot understand the process of change in which we are involved if we limit ourselves to thinking of the democratic, industrial and cultural revolutions as separate processes. Our whole way of life . . . is being profoundly affected by the progress and interaction of democracy and industry, and by the extension of communication."[68]

The cultural approach to communication, therefore, demands being aware of a number of fields, including sociology, anthropology, history and political science. Clifford Geertz, for example, has said, in words which reflect on the association between cultural anthropology and the cultural study of communication: "[M]an is an animal suspended in webs of significance he himself has spun. I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning."[69] Thus, in minimizing the importance of a cause-and-effect framework, cultural studies seeks to discover meaning by approaching communication from every applicable disciplinary

perspective, recognizing as it does that communication is culturally bound. Whereas science and its research methods typically seek predictability and conclusiveness, cultural studies advocates relinquishing this "'neurotic quest for certainty.'"[70]

James Carey, a proponent of the American cultural studies tradition, has said that communication never can be revealed through an objective method free from the corruption of culture.[71] Carey has described two views of communication, transmission and ritual. The transmission view has been the dominant motif of American scholarship, corresponding to the country's embrace of science, its attempt to isolate science from culture, and its belief that science provides a culture-free truth. Within this view, communication is seen as "signals or messages that are transmitted over distance for the purpose of control."[72] The ritual view, on the other hand, provides a cultural perspective in which communication is "directed not toward the extension of messages in space but toward the maintenance of society in time. . . . [Communication is] not the act of imparting information but the representation of shared beliefs . . . . [It] draws persons together in fellowship and commonality."[73]

Culture is the vehicle through which reality or meaning is created, according to cultural studies proponents. It is neither singular nor "univocal," but instead multiple.[74] The individual is perceived as actively creating his or her uniquely personal reality, rather than there being a universal reality created and imposed upon

society by assorted institutions, including the media. Through the cultural perspective, then, the process of reality creation is a "bottom-up" progression, not the "top-down" version that typically has been presumed. These individual realities are created in part through what literary and social critic Kenneth Burke called "terministic screens."[75] Burke compared these screens to filters over a camera lens: An individual brings his or her filter to any observation, and no one's "personal equations" are quite identical to those of anyone else.[76] According to Burke, "Even something so 'objectively there' as behavior must be observed through one or another kind of terministic screen."[77] Each person colors, or filters, incoming information, processing it in unique ways.

The concept of culture, according to Carey, is a weak notion in American social thought.[78] Traditionally there has been an instinctive resistance to the cultural studies approach. The juxtaposition between cultural studies and the scientific method is characterized by tension; Carey notes the desire by many to maintain a distinction between the so-called hard sciences and "soft scholarship."[79] The sciences, after all, were "the crowning achievement of Western civilization."[80] In some eyes, it is unconscionable not to accept the methods of the natural and behavioral sciences as the only valid approach to research.

In short, cultural studies urges an all-inclusive approach to studying communication. To understand the communication process, one must realize that it is merely part of a complex social experience,

in which the individual is subjected to a number of influences in creating personal reality. To ignore this phenomenon, to attempt to segregate communication from other cultural factors, is not only naive and myopic, according to cultural studies, it is to overlook human complexity. Nothing, communication and the law included, occurs in a vacuum.

B. Cultural Studies and Legal Scholarship

Carey has said that communication, as part of its culture-creating power, serves as an instrument to bind together diverse peoples.[81] Similarly, the law binds together people in America, an otherwise racially, religiously, politically and ethnically diverse society.[82] Law and communication share not only in contributing to culture-formulation, they also lend themselves to study from a cultural perspective.

Just as the effects tradition does not provide a complete picture of communication, neither does it do justice to the study of law. Rejecting the cultural studies approach results in a causal analysis. To study the law in the same way that communication typically was approached for a half-century would be to examine only decisions and statutes and their consequences. The factors contributing to those rulings and laws -- historical, social, political, economic and moral considerations, for example -- would be ignored. In fact, First Amendment research frequently is undertaken in just such a manner. Instead, a cultural perspective is recommended to

supplement any result-oriented analysis. Yet, historically, law has suffered from the same scientific method bias as has communication, being placed within the same effects framework where results are given precedence over understanding. A broader outlook is necessary.

The notion that contemporary legal studies somehow is incomplete is neither unique nor ground breaking. The highly charged movement of Critical Legal Studies (CLS), which traces its roots to the early part of this century, has offered such a critique.[83] Equally passionate is the reform championed more recently by feminist legal scholars, though in many cases from a perspective different than that of CLS.[84] Moreover, an undercurrent has developed within the mainstream legal community acknowledging that legal researchers fail to study the field from a broader, more complete base. Richard Posner, for example, has suggested that legal scholars are far too narrow in their approach, and has called on them to embrace and learn from literature.[85] Some legal studies scholars contend that the law is but one part of a cultural complex,[86] while others assert the need for lawyers to become more culturally aware.[87] Yet as admirable as these suggestions are, it is submitted that they have shortcomings themselves, failing to adopt the type of cultural studies perspective now known in the communication field.

Law -- particularly First Amendment law -- is rife with the influence of a variety of cultural factors. Indeed, the law can and does "play a role in shaping culture, but legal doctrine is part of the

culture and is frequently hostage to it."[88] Just as the media function through a "nexus of mediating factors and influences,"[89] so, too, does the law. Because of this, First Amendment scholarship must move away from the libertarian "rational person" perspective. As Toni Massaro has said, "Many modern philosophers . . . have become skeptical of rationalism in ways that are relevant to the traditional liberal first amendment justifications. Some scholars now maintain that our notions of good and evil are contingent, and that reason, trust, and meaning are determined historically and culturally -- not objectively or ahistorically."[90]

Followers of Critical Legal Studies have recognized the need to examine the culture surrounding legal decisions and processes. However, this does not equate CLS with the cultural studies approach posited here. One distinction is that CLS is unabashedly a political movement grounded in its concern with certain economic systems.[91] As one of its leaders and earliest adherents, Roberto Unger, has written, CLS intends nothing less than a "political and cultural revolution."[92] Cultural studies, on the other hand, focuses on belief systems, how they determine meaning for individuals and societies, and the implications of these meanings for societal institutions. Notwithstanding this distinction, however, it is helpful to discuss the CLS delineation of cultural influences on the law.[93]

CLS traces its roots to the legal realism movement of the 1920s and 1930s,[94] insisting that the structure of law allows judges to make decisions based on their on subjective feelings.[95] Those

feelings are influenced by factors external to the judiciary, particularly by one's personal biases -- in the words of Burke, by a judge's "terministic screens."[96] According to CLS, there is nothing objective, inevitable or natural in the law; all legal outcomes are subject to the "same political, social, moral, and religious value judgments from which the law purports to be independent."[97] Far from being separate from politics, law is little more than politics in disguise.[98]

The matter of indeterminacy is central to the critical approach to law, in which the language and content of legal rules are thought to be open to a wide spectrum of interpretations.[99] The indeterminacy thesis posits that "the existing body of legal doctrines -- statutes, administrative regulations, and court decisions -- permits a judge to satisfy any result she desires in any particular case. Put another way, the idea is that a competent adjudicator can square a decision in favor of either side in any given lawsuit with the existing body of rules."[100]

What influences a given adjudicator are the cultural -- political, social, historical, religious -- factors of a given period. This circumstance surfaces in at least two venues: first, the widely disparate interpretations of law by courts within the same finite historical period, but often over varying locales; second, the changing opinions of individual judges over time, including the evolving interpretations of law and consequent rulings.

First, that many appellate courts emphatically overturn lower court decisions is evidence that interpretations of law may vary across the variety of cultures found in this country. The political and historical factors, for example, extant in one locale likely will influence judges -- themselves, of course, residents of the regions in which they preside. A cursory examination of First Amendment cases in which the Supreme Court of the United States has overturned state court decisions, for instance, reveals several which originated in the southern region where, arguably, unique cultural values often prevail. These include New York Times v. Sullivan,[101] Estes v. Texas,[102] Miami Herald Publishing Co. v. Tornillo,[103] Chandler v. Florida[104] and Houston v. Hill,[105] all cases in which the Court rejected First Amendment interpretations by southern state judges. This is not to single out a particular region of the country, but merely to illustrate that regions -- all of them -- are unique, and that part of their individual characteristics sometimes is disclosed through the particular values which can surface not only in the interpretation of law, but in adoption of legislation as well. Thus, values inherent in one's culture can have an impact on how one interprets the law. Each judge has his or her own terministic screen. How this screen is structured in part is dependent upon the social, political, economic, historical and other influences present not only at the time and place that interpretation occurs, but also those influences existing throughout one's life which cause various personal values to develop.

Second, judges often change their individual readings of specific law over time. For example, David Kairys describes the

changes in Oliver Wendell Homes' views over the early decades of the twentieth century.[106] Holmes, generally thought to be a champion of First Amendment rights, ruled against a free speech appellant when sitting on the Supreme Judicial Court of Massachusetts.[107] In an analysis contrary to today's view, Holmes, writing for a unanimous court, upheld the conviction of a preacher who distributed leaflets in a public park. He reasoned that the park was city property, the mayor controlled the city and its parks, and therefore the mayor could exclude leaflet distribution in the park if he so chose. Holmes drew an analogy between that situation and a person wanting to control what occurs in his or her living room.

The case, upheld by the Supreme Court of the United States, became a First Amendment benchmark for four decades. Not until 1939 did the Supreme Court reverse itself, upholding the right of organized labor to assemble and to distribute pamphlets in city parks and on city streets and sidewalks.[108] In that case, nearly forty-five years after affirming the Holmes decision, the Court ruled that cities do own the parks and streets, but that they hold them in trust for the people, who have a right to gather and speak there. The question is: Why did the Court so blatantly reverse itself? According to Kairys, "[T]here is no acceptable <u>legal</u> explanation for the change and one must look to historical and political factors to understand it."[109] That is, a variety of cultural circumstances and events contributed to this transformation of the Court's view.

According to Vincent Blasi, particular understandings of the First Amendment are accepted at different times in the country's history, dependent in part on the "political culture" of the period.[110] The process of accepting one view over another is characterized first by bold assertions of proponents, then endorsements by key decision-makers and finally gradual recognition by diverse elements of the political community. Central norms, presumably at least those considered by judges when considering rulings, are subject to the same social dynamics as are other cultural phenomena. These norms derive their authority initially from public acceptance, then ultimately from the attitudes of the political community, and they are threatened when public attitudes shift.[111]

This developmental pattern was demonstrated in the Massachusetts case and its aftermath. There, the preacher lacked political support from his community. There was no media discussion of or congressional concern about the free speech issue. But by the late 1930s American political, social and economic climates had changed, and with them the Supreme Court's view.[112] It was at this time, for example, that the labor movement grew, becoming

> the only massive, significant movement to press the demand for free speech . . . . [T]he labor movement of the 1930s was the first that was mass-based and posed a clear threat to the organized social structure. The labor movement was the closest this country has come to a leftist revolution; people were aware of this and talked in language that revealed how aware they were. . . . Labor needed the ability to organize workers . . . [and] like any

> other movement that gains members and becomes a real presence in society, tended to change social values and people's ways of thinking. . . . Even a judge who was antagonistic to the left would realize the considerable merit in bringing this conflict within the system and controlling it . . . .[113]

Contributing to judges altering their interpretations over time is what Blasi has called "pathological periods," which occur "when social or political conditions in the relevant community (national, regional, or local) generate a shift in attitudes regarding a toleration that places in jeopardy one or more of the commitments that comprise the core of the first amendment."[114] Judges are affected by these changes in social and political conditions, and not only during pathological periods. The popular perception of a judiciary that is apart from -- even above -- cultural influences should be questioned. Like all institutions, the judiciary is subject to cultural pressures and changes. Holmes has written regarding the influence of values on the law and the need to adopt broad perspectives to comprehend the status of the law:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law . . . cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.[115]

The benefit of a cultural studies approach to legal scholarship is apparent. Attempts to isolate the law in an effort to study it or any of its constituent elements proves illusory. Just as with communication, factors outside the boundaries of the law affect development within those boundaries; and, just as with communication, a cultural studies approach accommodates this reality.

IV. Cultural Studies and Comparative Law

Virtually by definition, comparative law -- the study of how the laws and/or legal system of one country compare with those of another -- demands an approach that, if not embracing the tenets of cultural studies, closely parallels them. Otherwise, the result is purely descriptive, devoid of explanation as to why the countries' laws are similar or different. Examining legal systems across national boundaries should mean analyzing them across cultures, and those cultures are molded by unique sets of factors, including social, philosophical, economic, historical, religious. This particularly is important when comparing freedom of expression in different countries.

A recent ruling on pornography by the Supreme Court of Canada offers a pertinent illustration of not just the value of applying a cultural approach to comparative legal studies, but the necessity of doing so. In Butler v. The Queen,[116] the court ruled that although the anti-pornography law[117] at issue infringed on freedom of expression

as guaranteed in the Canadian Charter of Rights and Freedoms,[118] it was legitimate to suppress materials that harm women. The decision redefines obscenity from a focus on whether materials "exploit sex as a dominant characteristic" and whether that exploitation is "undue,"[119] to a concern with whether a publication subordinates or degrades women. The ruling by a unanimous court stated, in part, that "there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole."[120]

This premise has been argued, but thus far rejected, in the United States.[121] Instead, in this country the standards set down nearly twenty years ago in Miller v. California[122] continue to prevail. The guiding principle is whether the material in dispute is protected by the First Amendment, and not whether the consequences of allowing distribution of such material may or will harm members of society. Miller and its progeny do not discuss the latter question.

If, in fact, freedom of expression is guaranteed in Canada through the Canadian Charter of Rights and Freedoms, as it is in the United States through the Constitution, what can explain this difference in approach to pornography in the two countries? The answer, which cannot be explored fully within the context of this paper, likely lies in cultural differences between the two national neighbors. These differences will not be discerned through only an analysis of the texts or applications of the Butler and Miller decisions,

and cases preceding or following them. Nor will it be sufficient to examine the Charter and the Constitution. For example, the Canadian Charter, while protecting freedom of expression,[123] also contains a strong equality section.[124] According to Kathleen Mahoney, who represented an intervener in Butler, the material at issue in the case "harms women personally, harms their right to be equal, affects their security and changes attitudes toward them so they become more subject to violence."[125] However, the Constitution of the United States also has an equal protection clause,[126] and while this has been applied specifically to issues involving women,[127] it has not been interpreted to include protecting women from the effects of the distribution of pornographic material.

Rather than limiting analysis to a parsing of texts, a cultural studies approach to examining the legal status of pornography in Canada and the United States is more likely to reveal why similar codifications have resulted in markedly different court interpretations. It becomes essential to determine what forces have contributed not only to the formulation of the laws, but what factors have influenced application of the codes. That is, what factors have given meaning to the two countries' understandings of freedom of expression?

One prominent analytical approach in the field of comparative law is Alan Watson's "borrowing" framework. He posits that much of the law in any given jurisdiction is borrowed from other locales, often regardless of its applicability:

> [L]aw develops by transplanting, not because some such rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over law making and they observed the (apparent) benefits which could be derived from it. . . . [The] relationship between one legal system and another which is the result of borrowing is, I believe, the heart of comparative law.[128]

Watson would argue, then, that many elements of laws in different societies have similar roots. He maintains that the best method of analysis is an historical one, learning the origin of the law and its development and transformation, particularly when the same or historically-related rules can be observed in different systems,[129] this being "the best approach to understanding the law and its relationship with society."[130] Thus, knowledge of the social systems at work within a given culture are key to understanding the society's legal development. Watson claims that the "opportunity and the glory" of comparative law lies "in the discovery of forces that are permanently at work in all systems of law."[131] That is, the value lies in ascertaining the cultural influences at work which help create meaning within a nation's legal system.

Watson's framework takes into account that the borrowing of legal systems and concepts often has been haphazard, perhaps for no better purpose than convenience. In this process, the borrowing society did not necessarily consider its unique circumstances, i.e., its cultural contexts. Consequently, in applying the borrowed laws, the country then would have to adapt the standards to its own situation.

In effect, this would force the legal evolutionary process to pay heed to the cultural conditions in which it operated. This makes it difficult to apply comparative analysis to the similarities and differences among legal systems without examining the factors forging the changes and adaptation.

A cultural studies approach to comparative law is particularly important when studying the variations in law, including freedom of speech and press, between two nations, such as Canada and the United States, which share a common lineage in their inherited legal traditions, i.e., the common law of England. Interestingly, both Canada and the United States have written documents specifically protecting freedom of expression, though the concept is applied differently. On the other hand, there is no document in England stating that such protection exists. Although Parliament and the English courts do recognize freedom of expression, in some instances standards are used different from those in either Canada or the United States. This is only a microcosm of the complexities facing the comparative law scholar. Differences between legal systems should be analyzed not only by examining the texts of pertinent laws, and not only by looking at the historical circumstances as Watson posits, but also by considering other factors which influence cultural evolution. This type of analysis, suggested by the application of cultural studies to legal scholarship, leads to a more complete understanding of differences among legal systems. For example, it may shed light on why disparate approaches to pornography have evolved in two nations whose roots in the law are so similar.

V. Conclusion

Cultural studies, as used in communication research, is a perspective that suggests individuals process a number of different influences that impinge upon them, including the mass media, in creating meanings in their lives and, thus, developing their views of reality. This paper posits that legal research, particularly freedom of expression, media law and comparative law scholarship, would benefit from adopting the cultural studies approach. Taking a more inclusive view of factors which help determine the values of judges, legislators and other decision-makers will facilitate a better understanding of the ways in which freedom of expression law, both in the United States and other countries, has developed. As Geertz has stated, the objective of cultural studies is not so much to answer all our questions but "to make available to us the answers that others . . . have given and thus include them in the consultable record of what man has said."[132]

It must be emphasized that suggesting a cultural studies perspective be applied, for example, to freedom of expression issues in no way proposes that traditional, constitutionally-based perspectives are invalid. To the contrary, there can be no better starting point in legal analysis than the Constitution and interpretations of that document. Carey has emphasized that communication researchers should not forsake the effects tradition.[133] It would be equally as ill-advised to abandon

traditional legal analysis. But the cultural studies perspective can add to freedom of expression research a broader base from which to analyze freedom of expression, media law and comparative law questions. Taken together, the approaches are superior to a single, narrow outlook.

It is not suggested here that legal scholars utilizing a cultural studies framework should adopt a strategy Robert Gordon has labeled "Cartesianism," that is, "formal modelling, the intellectual strategy of constructing highly simplified models of social reality for the sake of analytic rigor and elegance . . . ."[134] Taking a slice of the reality in which the legal system operates, or using reductionism to carve away the important nuances of context, is no more acceptable than selectively choosing case precedents, ignoring those which are applicable but difficult to reconcile. Rather, applying cultural studies to the study of freedom of speech and press might be seen as, to paraphrase Iredell Jenkins, First Amendment researchers not asking, What is freedom of expression?, but instead, Why is freedom of expression?[135] The latter question can be answered adequately only by recourse to a larger context in which a variety of pertinent data are examined and methodological approaches utilized, and by a jurist asking why society has construed the meaning of its legal system as it has.

Notes

[1]References often are made in First Amendment research to, for example, John S. Mill, On Liberty (G. Himmelfarb ed. 1985) (1859); John S. Mill, Utilitarianism (S. Gorovitz ed. 1971) (1863); Justice Oliver W. Holmes' opinions in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting); Schenck v. United States, 249 U.S. 47 (1919).

[2]See, e.g., Ulrich Karpen, Freedom of Expression as a Basic Right, 37 Am. J. Comp. L. 395 (1989).

[3]This is not to suggest that no legal scholars have recognized societal influences on decision making in the law. Early attempts to break from the strait-jacket of traditional legal research may be seen in Karl Llewellyn, Some Realism About Realism, 44 Harv. L. Rev. 1222 (1931); Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1897). Generally, see Donald M. Gillmor & Everett E. Dennis, Legal Research in Mass Communication, in G. Stempel & B. Westley, Research Methods in Mass Communication 330-37 (1981).

[4]Examples of early writing in law and economics are Gary Becker, The Economics of Discrimination (1957); Ronald Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960).

[5]See, e.g., Stanley Fish (ed.), Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (1989); Mark Kelman, A Guide to Critical Legal Studies (1987).

[6]See, e.g., Charles R. Lawrence III, If He Hollers, Let Him Go: Regulating Racist Speech on Campus, 1989 Duke L.J. 431; Mari S. Matsuda, Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320 (1989).

[7]See, e.g., Patricia A. Cain, Good and Bad Bias: A Comment on Feminist Theory and Judging, 61 S. Cal. L. Rev. 1945 (1988); Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. Cal. L. Rev. 1877 (1988); Catharine A. MacKinnon, Feminism Unmodified (1987).

[8]See, e.g., Jeremy Cohen & Timothy Gleason, Social Research in Communication and Law (1990).

[9]See, e.g., Surya Prakash Sinha, What Is Law? The Differing Theories of Jurisprudence 157-70 (1989); Rita James Simon, The Sociology of Law (1968).

[10]Allan C. Hutchinson & Patrick J. Monahan, Law, Politics, and the Critical Legal Scholars: The Unfolding of American Legal Thought, 36 Stan. L. Rev. 199, 200 n.6 (1984); see also Martin Shapiro, Courts: A Comparative and Political Analysis (1981).

[11]Robert W. Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 59 (1984).

[12]"Writers in the dominant tradition . . . divide the world into two spheres, one social and one legal. "Society" is the primary realm of social experience. It is 'real life': What's immediately and truly important to people . . . . 'Law' or 'the legal system,' on the other hand, is a distinctly secondary body of phenomena. It is a specialized realm of state and professional activity that is called into being by the primary social world in order to serve that world's needs." Id. at 60.

[13]Antonio Gramsci terms this "hegemony," neither the proponents or opponents of a system question the basis of the present order. See Antonio Gramsci, Selections from the Prison Notebooks (Quinton Hoare & Geoffrey Nowell-Smith, eds. and trans.) 195-96, 246-47 (1971); Robert W. Gordon, New Developments in Legal Theory, in David Kairys (ed.), The Politics of Law 418 (2d ed. 1990).

[14]See, e.g., Steven Shiffrin, The First Amendment, Democracy, and Romance 46-85 (1990); C. Edwin Baker, Human Liberty and Freedom of Speech 47-91 (1989).

[15]See, e.g., David F. McGowan & Ragesh K. Tangri, A Libertarian Critique of University Restriction of Offensive Speech, 79 Calif. L. Rev. 825 (1991).

[16]See Louis Hartz, The Liberal Tradition in America (1955).

[17]See, e.g., John Locke, Two Treatises of Government (P. Laslett ed. 1960) (3d ed. 1698).

[18]See, e.g., Thomas Hobbes, Leviathan (A. Lindsay ed. 1950) (1651).

[19]See Richard H. Fallon, Jr., What Is Republicanism, and Is It Worth Reviving?, 102 Harv. L. Rev. 1695, 1697 (1989).

[20]Id. at 1700 (citing Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 270-72 (1988)).

[21]See, e.g., Alexander Bickel, The Least Dangerous Branch 16 (1962). Prof. Toni Massaro calls the Bill of Rights "the antimajoritarian rider to the democratic Constitution." Toni M. Massaro, Equality and Freedom of Expression: The Hate Speech Dilemma, 32 Wm. & Mary L. Rev. 211, 225 (1991). Some have tied to the countermajoritarian view a "contractarian moral theory": "[W]hatever the historical obscurities which surround the proposal and adoption of the Bill of Rights, there is little question that the Bill was part of and gives expression to a developing moral theory regarding the moral rights of human beings which had been theoretically stated by Milton and Locke and which was being given or was to be given expression by Rousseau and Kant." David A.J. Richards, The Moral Criticism of Law 44 (1977) (footnotes omitted).

[22]See, e.g., Lillian BeVier, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, 30 Stan. L. Rev. 299 (1978); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. Rev. 1 (1971); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245 (expanding definition of what constitutes political speech); Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948).

[23]John Milton, Areopagitica (London 1644), in 2 Complete Works of John Milton 486 (E. Sirluck ed. 1959).

[24]See Abrams, supra note 1, at 630 (Holmes & Brandeis, JJ., dissenting).

[25]See, e.g., Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 Duke L.J. 1.

[26]See, e.g., David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 Colum. L. Rev. 334, 352-53 (1991).

[27]See, e.g., Board of Ed v. Pico, 457 U.S. 853, 866 (1982).

[28]See, e.g., Paul G. Chevigny, More Speech (1988); 1 Jurgen Habermas, The Theory of Communicative Action (T. McCarthy trans. 1984); Richard Rorty, Philosophy and the Mirror of Nature 373-79 (1979).

[29]See, e.g., Thomas I. Emerson, Toward a General Theory of the First Amendment 4-7 (1966).

[30]See Martin Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591 (1982).

[31]See C. Edwin Baker, Human Liberty and Freedom of Speech 47-54 (1989).

[32]See Emerson, supra note 29, at 4-7.

[33]See Baker, supra note 31.

[34]Both the self-governance and self-fulfillment values are in opposition to a philosophy of law, not often applied in First Amendment analysis, which is both 350 years old and undergoing a resurrection. The influence of "classical republicanism," some argue, "far outweighed" that of Lockean liberalism in informing the Constitution's framers. Fallon, supra note 19, at 1696. "[H]istorical republicanism would encompass a few core tenets: that human beings are essentially political animals, that they can fulfill their natures only by participating in self-government, and that the most important aims of the political community should be to promote virtue among the citizenry and to advance the common

good." Id. at 1697 (footnotes omitted). Currently, considerable attention is being paid to the study of republicanism. See, e.g., Frank Michelman, Law's Republic, 97 Yale L.J. 1493 (1988); Cass Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988).

[35]Thomas Streeter, Beyond Freedom of Speech and the Public Interest: The Relevance of Critical Legal Studies to Communications Policy, 40 J. Comm. 43, 44-45 (Spring 1990).

[36]Critical legal studies proponents have not extensively discussed freedom of expression. However, for insight into what the views of some might be regarding liberalism, see Tushnet, supra note 20; Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buffalo Law Review 205 (1979); Roberto M. Unger, Knowledge & Politics (1975). See also infra text accompanying notes 91-100.

[37]Gillmor & Dennis, supra note 3, at 328.

[38]Richard A. Posner, The Present Situation in Legal Scholarship, 90 Yale L.J. 1113, 1121. "[L]aw professors . . . will not stray far from the logic of the opinion or the series of opinions they are examining." Id. at 1114.

[39]See Cohen & Gleason, supra note 8, at 16 (citing Muller v. Oregon, 208 U.S. 412 (1908), in which Louis Brandeis submitted to Court "a brief that included a collection of social, economic, and public health research"); see also Ronald K. Collins & Jennifer Friesen, Looking Back on Muller v. Oregon, 69 A.B.A.J. 294 (1983).

[40]See Max Weber, Economy and Society (Guenther Roth & Claus Wittich, eds. 1978).

[41]Geoffrey C. Hazzard, Jr., Limitations on the Uses of Behavioral Science in the Law, 19 Case W. Res. L. Rev. 71, 76-7 (1987) (quoted in Cohen & Gleason, supra note 8, at 16).

[42]David L. Faigman, To Have and Have Not: Assessing the Value of Social Science to the Law As Science and Policy, 38 Emory L.J. 1005 (1989); see also Abraham Kaplan, Behavioral Sciences and the Law, 19 Case W. Res. L. Rev. 57 (1967).

[43]Faigman, supra note 42, at 1095.

[44]See, e.g., Margaret Blanchard, Exploring the First Amendment (1988).

[45]See, e.g., David A. Anderson, Media Success in the Supreme Court, Gannett Center for Media Studies Working Paper (1987) (cited in Cohen & Gleason, supra note 7, at 87); Marc A. Franklin, Suing Media for Libel: A Litigation Study, 1981 Am. Bar Found. J. 797; Marc A. Franklin, Winners, Losers and Why: A Study of Defamation Litigation, 1980 Am. Bar Found. J. 455.

[46]See, e.g., F. Dennis Hale, The Federalization of Libel by Two Supreme Courts, Comm. & Law, Sept. 1989, at 19.

[47]See, e.g., Jeremy Cohen, Diana Mutz, Clifford Nass & Laurie Mason, Experimental Test of Some Notions of the Fact/Opinion Distinction in Libel, 66 Journ. Q. 11 (1989); Jeremy Cohen, Diana Mutz, Vincent Price & Albert Gunther, Perceived Impact of Defamation: An Experiment on Third Person Effects, 52 Pub. Opinion Q. 161 (1988).

[48]See, e.g., Newton v. NBC, 913 F.2d 652 (1990) (transcript of jury trial quoted in Cohen & Gleason, supra note 8, at 93 (witness presenting testimony of public opinion poll regarding libel plaintiff's reputation).

[49]See, e.g., Elihu Katz & Paul F. Lazarsfeld, Personal Influence (1955); Carl I. Hovland, et al., Communication and Persuasion: Psychological Studies of Opinion Change (1953); Carl I. Hovland, et al., Experiments in Mass Communication (1949); Paul F. Lazarsfeld, et al., The People's Choice (1944),

[50]Denis McQuail, Mass Communication Theory: An Introduction 251 (2d ed. 1987).

[51]Id. at 252. This period began at the turn of the century and extended into the late 1930s. Research testing this "all-powerful" premise defined another distinct phase from the early 1930s to the early 1960s. Id. at 253.
[52]James Carey, Communication as Culture: Essays on Media and Society 44 (1989).
[53]Id. at 94-95.
[54]Graham Murdock, Cultural Studies, 6 Crit. Studies in Mass Commun. 436, 436 (1989).
[55]McQuail, supra note 50, at 65.
[56]Carey, supra note 52, at 97.
[57]See, e.g., Raymond Williams, Culture and Society, 1780-1950 (1958).
[58]See, e.g., E. P. Thompson, The Making of the English Working Class (1963).
[59]See, e.g., Richard Hoggart, The Uses of Literacy (1961).
[60]See, e.g., Max Weber, The Theory of Social and Economic Organization (1947).
[61]See, e.g., Roland Barthes, Elements of Semiology (1967).
[62]See Thomas R. Lindlof, The Qualitative Study of Media Audiences, 35 J. Broadcasting & Electronic Media 23, 27 (1991).
[63]See, e.g., David Morley, Family Television: Cultural Power and Domestic Leisure (1986).
[64]Stuart Hall, Cultural Studies: Two Paradigms, in Media, Culture and Society: A Critical Reader 63 (R. Collins, et al. eds, 1980).
[65]Carey, supra note 52, at 41.
[66]See id. at 96-97. Harold Innis concurrently was undertaking similar work in Canada.
[67]See John VanMaanen, Tales of the Field 18 (1988).
[68]Raymond Williams, The Long Revolution xi (1958) (emphasis in original).
[69]Clifford Geertz, The Interpretation of Cultures 5 (1973).
[70]Carey, supra note 52, at 89 (quoting John Dewey).
[71]Id. at 31.
[72]Id. at 15.
[73]Id. at 18.
[74]Id. at 65.
[75]Kenneth Burke, Language as Symbolic Action 45 (1966); see also id. at 44-62.
[76]Id. at 52.
[77]Id.
[78]Carey, supra note 52, at 19.
[79]Id. at 99.
[80]Id. at 19.
[81]Id. at 5.
[82]Jill Norgren & Serena Nanda, American Cultural Pluralism and Law ix (1988) (citing George Mitchell, majority leader of the United States Senate).
[83]See infra text accompanying notes 91-100.
[84]See, e.g., Catharine A. MacKinnon, Not a Moral Issue, 2 Yale L. & Pol'y Rev. 321 (1984).
[85]Richard A. Posner, Law and Literature: A Misunderstood Relation (1988).
[86]See, e.g., Michael Richmond, The Cultural Milieu of Law, 13 Nova L. Rev. 89 (1988).
[87]See, e.g., Richard Weisberg, Coming of Age Some More: "Law and Literature" Beyond the Cradle, 13 Nova L. Rev. 107 (1988).
[88]Steven Shiffrin, The First Amendment, Democracy, and Romance 73 (1990).
[89]Joseph T. Klapper, The Effects of Mass Communication 8 (1960).

[90]Massaro, supra note 21, at 227; see also id. at 227-29.

[91]CLS and cultural studies adherents likely would agree that it is not that judges, lawyers and legal scholars do not base their views "upon a complex mixture of social, political, institutional, experiential, and personal factors," but rather that those views explicitly are justified, instead, "in terms of 'facts' that have been objectively determined and 'law' that has been objectively and rationally 'found' and 'applied.'" David Kairys, Introduction, in Kairys. supra note 13, at 4. When that "complex mixture" of elements which influence judicial decisions or legal arguments is not made clear, one cannot assume that the factors have been properly considered, or that all appropriate factors have been considered. More, one cannot dispute the bases for the opinion, since they have not been revealed. As Kairys has stated, "the common characterization of the law and the state as neutral, value-free arbiters, independent of an unaffected by social and economic relations, political forces, and cultural phenomena" must be rejected. Id. at 6. Since the law is not and cannot be that, and since many "forces" and "phenomena" do influence legal opinions, it should be that all the appropriate factors are considered explicitly.

[92]Roberto Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 586 (1983).

[93]It is beyond the scope of this paper either to examine or account for the CLS contention that law ultimately is used by a power elite as a tool to maintain the status quo.

[94]In part, legal realists argued that the law is to be studied from the perspective of decisions made by and actions taken by judges. See e.g., John C. Gray, The Nature and Sources of the Law (1921); for a more recent view, see Karl Llewellyn The Bramble Bush: On Our Law and Its Study (1960).

[95]See Lewis D. Solomon, Humanistic Economics: A New Model for the Corporate Constituency Debate, 59 U. Cin. L. Rev. 321, 330 (1990).

[96]Burke's characterization of the Constitution as a set of "very highly generalized wishes" is yet another of his contributions to this discussion. Kenneth Burke, A Grammar of Motives 366 (1945) (quoted in Jack Lule, Media Studies Approaches to Communications Law, Journalism Educator, Summer 1990, at 54). The First Amendment, for example, is a series of wishes, but conflicting wishes. When such conflicts arise, courts serve as "arbiters," and "the choice between wishes often is a matter not of logic or justice, but of political, social, economic, and cultural context." Lule, supra, at 55.

[97]David Kairys, Law and Politics, 52 Geo. Wash. L. Rev. 243, 247 (1984).

[98]Donald H. Gjeringen, The Future of Legal Scholarship and the Search for a Modern Theory of Law, 35 Buff. L. Rev. 381, 409 (1986).

[99]See Kent Greenawalt, How Law Can Be Determinate, 38 UCLA L. Rev. 1, 3 (1990).

[100]Lawrence B. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. Chi. L. Rev. 462, 462 (1987).

[101]376 U.S. 254 (1964) (overturning $500,000 libel judgment against newspaper).

[102]381 U.S. 532 (1965) (overturning fraud conviction on basis that television camera in courtroom constituted violation of defendant's Sixth Amendment rights).

[103]418 U.S. 241 (1974) (finding unconstitutional state right-of-reply law).

[104]449 U.S. 560 (1981) (finding that television cameras in courtroom do not necessarily violate defendant's Sixth Amendment rights).

[105]482 U.S. 451 (1986) (finding violative of First Amendment local ordinance making it unlawful to interrupt police officer when performing duties).

[106]See Kairys, supra note 97.

[107]Davis v. Massachusetts, 162 Mass. 510, 39 N.E. 113 (1895), aff'd, 167 U.S. 43 (1897).

[108]Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939).

[109]Kairys, supra note 97, at 255 (emphasis added).
[110]See Vincent Blasi, The Pathological Perspective and the First Amendment, 85 Colum. L. Rev. 449 (1985).
[111]See id. at 462.
[112]Kairys, supra note 97, at 253-55.
[113]Id., at 256-58.
[114]Blasi, supra note 110, at 466.
[115]Oliver W. Holmes, The Common Law 1-2 (1881) (quoted in Daniel A. Farber, The Originalism Debate: A Guide for the Perplexed, 49 Ohio St. L.J. 1085, 1104 (1989)).
[116]R. v. Butler, S.C.J. No. 15 (Quicklaw Feb. 27, 1992).
[117]The Canadian Criminal Code defines obscenity as a publication whose dominant characteristic is the "undue exploitation of sex, or sex and any one or more of the following subjects, namely crime, horror, cruelty and violence." Criminal Code, R.S.C., 1985, c. C-46, s. 163(8). This section of the code was challenged by Donald Butler, who was charged with 250 counts of possessing obscene material for sale, and with distribution of obscene tapes and magazines. See Stephen Bindman, Porn Laws Backed As Reasonable Restriction, Vancouver Sun, Feb. 28, 1992, at A8.
[118]Canadian Charter of Rights and Freedoms, pt. 1 of the Constitution Act, 1982, s. 2(b).
[119]Butler, supra note 116, at 4 (DB SCJ).
[120]Id. at 57. The court held that "materials portraying women as a class as objects for sexual exploitation and abuse have a negative impact on the individual's sense of self worth and acceptance." Stephen Bindman, Anti-Pornography Laws Don't Violate Rights Charter, Says Supreme Court, Ottawa Citizen, Feb. 27, 1992, at A1.
[121]See, e.g., American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (1985), aff'd, 475 U.S. 1001 (1986). Catharine MacKinnon, who has urged that United States courts take the view expressed by the Supreme Court of Canada and who assisted in preparing a brief in the Butler case, said after the decision was announced, "In the United States the obscenity laws are all about not liking to see naked bodies, or homosexual activity, in public. Our laws don't consider the harm to women. But in Canada it will now be materials that subordinate, degrade, or dehumanize women that are obscene." Tamar Lewin, Canada Court Says Pornography Harms Women and Can Be Barred, The New York Times, Feb. 28, 1992, sec. 1 at 1.
[122]413 U.S. 15, 24 (1973) (A publication is obscene if it is a "work, taken as a whole, [which] appeals to the prurient interest . . . depicts . . . in a patently offensive way, sexual conduct . . ., and . . . taken as a whole, lacks serious literary, artistic, political, or scientific value.").
[123]The Charter ensures "freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication." Canadian Charter of Rights and Freedoms, pt. 1 of the Constitution Act, 1982, s. 2(b).
[124]Id. at s. 1.
[125]Lewin, supra note 121, sec. 2, at 10.
[126]U.S. Const. amend. XIV, § 1.
[127]See, e.g., Califano v. Wescott, 443 U.S. 76 (1979) (striking down system allocating benefits to families with dependent children based on father's, not mother's, unemployment); see also Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984).
[128]Alan Watson, Comparative Law and Legal Change, 37 Cambridge L.J. 313, 315-16 (1978).
[129]Id. at 316.
[130]Id. at 318.
[131]Id. at 320.

BEST COPY AVAILABLE

[132]Geertz, supra note 69, at 30.
[133]Carey, supra note 52, at 93.
[134]Robert W. Gordon, Historicism in Legal Scholarship, 90 Yale L.J. 1017, 1026 (1981).
[135]See Iredell Jenkins, Social Order and the Limits of Law 3-4 (1980).